

r e f o r m
w e e k III

C o m m e r c i a l
B u s i n e s s
P r a c t i c e s

Facilitator Guide

Acquisition Reform Week III Commercial Business Practices

Scope of Seminar

A key requirement of a FAR Part 12 Commercial Item procurement is to incorporate customary terms and conditions in the resulting contract. This seminar addresses how to identify Commercial Business Practices, and how to use them in the acquisition of commercial items under FAR Part 12. Key Part 12 clauses and provisions are compared to their noncommercial item counterparts to highlight the differences. The Uniform Commercial Code (UCC) is introduced as a valuable source of both commercial business and contracting practices. *

Instructions to Facilitators

Each Acquisition Reform Week III seminar takes approximately one and one-half hours to complete. To maximize the potential for participants to gain an overall understanding of the subject, we suggest you hand out presentation materials 2-to-24 hours in advance. If participants read the information before the seminar, the facilitator can conduct a brief recap and then devote a significant portion of the time to practical experience such as exercises, e.g. working through the situations which demonstrate the principles outlined in the presentation. The exercise instructions set forth the framework and goals for the exercises. The answers and guidance provide answers to the exercises as well as additional questions and information to further stimulate thought and discussion of the issues.

As Facilitator you will need a copy of the full package which is detailed below. Participants should receive item #2 in advance, if possible. Item #3 should be handed out in the seminar. Items #1 and #4 are for the exclusive use of the Facilitator.

Included in this file are the following:

1. Facilitator Guide.....	1-2
2. Overview and Presentation for Participants	3-33
3. Exercise Task.....	34-37
4. Answers and Guidance.....	38-39

TIP: Print pages in the order noted so you will have one complete package. Then, duplicate individual sections, as needed depending on number of participants. This will ensure materials are in correct order and will reduce the risk of the file being too large for computer or printer equipment to handle with ease.

Main Teaching Points

These are the three main teaching points in this seminar. Before proceeding to the exercises, make sure participants understand the following:

1. The Government prefers to meet its requirements through either the acquisition of commercial items or modified commercial items.
2. When acquiring commercial items, the Government should adopt customary commercial practices either addressed in Part 12 or identified through market research and found to be appropriate for the acquisition.
3. The Government may tailor many of the Part 12 provisions and clauses to be consistent with customary commercial practices and to adapt to market conditions affecting a given acquisition.

* This seminar was tailored from materials used in the 3-day Advanced Acquisition Reform Training Workshop, developed and presented by the BRTRC Institute for HQ Department of Army. For more information please contact (703) 205-1593, or visit our website at: <http://institute.brtrc.com>.

Overview and Presentation for Participants

Acquisition Reform Week III Commercial Business Practices

Overview

Welcome to the Acquisition Reform Week III seminar, Commercial Business Practices (CBP). This session is designed to help participants do the following:

1. Be able to meet Government requirements through the acquisition of commercial items.
2. Apply appropriate commercial practices, either addressed in FAR Part 12 or identified through market research, to the acquisition process.
3. Be able to tailor FAR Part 12 provisions and clauses to be consistent with customary commercial practices and to adapt to market conditions affecting a given acquisition.

Exercise Objective

You are serving as the Contracting Officer on a commercial item acquisition for state of the art copiers (reprographics equipment) and related support maintenance. The documentation available indicates that these items will need to be procured by your RFP since they are not available through GSA or any other Government schedule or contract arrangement.

You have an upcoming meeting with the Program Manager for this acquisition. Your immediate task is to evaluate the results of your market research and to formulate a viable "plan of action" when meeting with the Program Manager. This discussion will focus on presenting the best approach to the solicitation/acquisition process, while showing your ability to utilize commercial practices related to this acquisition.

Later, after receiving the proposals, it will be your duty to evaluate each proposal on the basis of their alternative terms and conditions.

Instructions to Participants

Please review the presentation. Be prepared to ask questions and/or participate in a brief recap. This will be followed by more information about the exercises. The training session is designed to test your understanding of the principles captured in the presentation material and give you hands-on experience in dealing with Commercial Business Practices.

Commercial Business Practices

Acquisition
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WEEK II



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Commercial Business Practices

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Welcome to Commercial Business Practices

This lecture focuses on the evaluation and use of commercial business and contracting practices within the context of contracting for Commercial Items under the FAR. When we use the term “commercial item”, we refer to those items meeting the definition of commercial items in FAR Part 2.

- It will provide an understanding of some of the differences between the Commercial Item terms and conditions in FAR Part 12, and those in other parts of the FAR traditionally used in acquisitions.
- It will also offer an insight into tailoring solicitations to incorporate applicable customary commercial practices, as well as into drafting, evaluating and utilizing alternative terms and conditions in FAR Part 12 contracts.
- In many instances we'll take a look beyond the FAR Part 12 clauses to refer to the Uniform Commercial Code - a source of information on commercial business and contracting practices - and gain additional understanding of a given situation.
- Finally, there will be a practical exercise to illustrate major points.

Why Buy Commercial

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FASA established Government's:

- preference for commercial items
- requirement to conduct market research
- acquisition policies to resemble commercial marketplace's

Clinger-Cohen provided more impetus



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Commercial Business Practices

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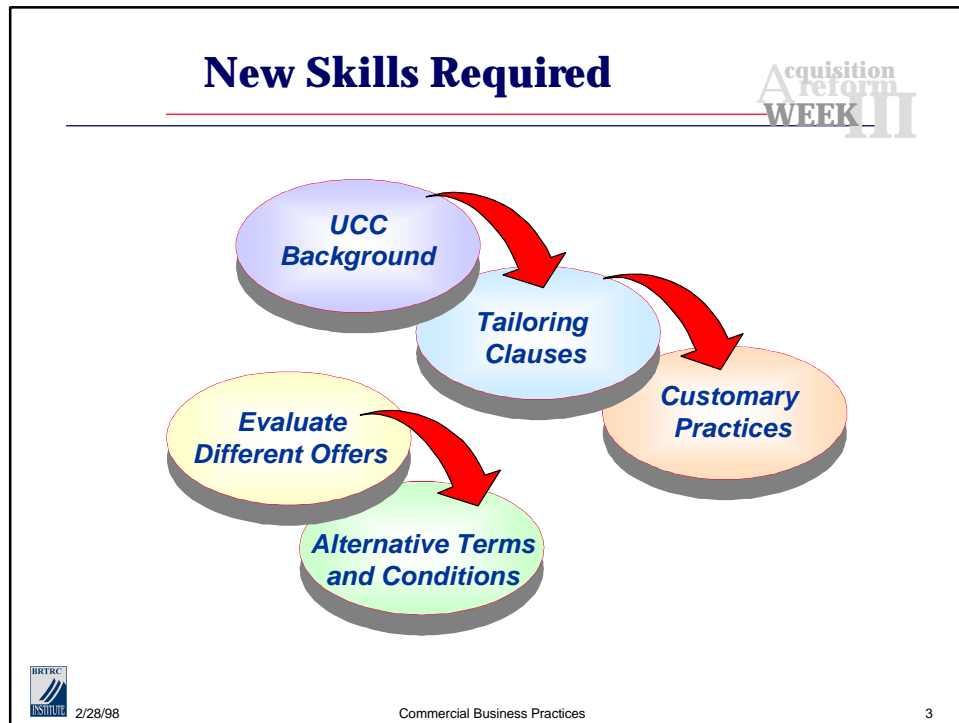
For any government agency, understanding commercial business practices became a need with the introduction of FASA in 1994. This piece of legislation requires agencies to conduct market research to determine whether commercial items are available to meet their needs. If the inquiry yields positive results, the acquisition of the commercial item should take place, in other words, a statutory preference was established.

FASA also established a set of acquisition policies for commercial items more in line with industrial practices. These guidelines were grouped under FAR Part 12.

Clinger-Cohen further accelerated and supported these initiatives. Clinger-Cohen made Cost Accounting Standards generally NOT applicable to commercial item contracts (meaning contractors are not required to establish specific Government approved accounting systems); it established the Simplified Acquisition Test Procedures that permit larger commercial item acquisitions to be procured under Part 13 (up to \$5 million); and it permitted DoD to lease equipment and vehicles under commercial item procedures.

In short, buying commercial items and utilizing appropriate commercial business practices will allow the Government to further implement the acquisition reform initiatives of the past few years.

12.000, 12.101, 12.102



Examples of the new skills required by government contracting personnel to:

- Determine what are customary commercial practices.
- Tailor terms and conditions to particular commercial buy.
- Develop understanding of background supporting many of the commercial practices encountered. This is often found in the Uniform Commercial Code.
- Evaluate different commercial offers.
- Evaluate alternative terms and conditions proposed by offerors.

There are also impacts on non-government contract professionals:

- Deal with government contracting personnel almost in the same way they deal with other industry customers.
- Those who have never cared to deal with the Government may now find they are able to do so, on terms they are accustomed to.

Government acquisitions will definitely be open to a much larger segment of the marketplace.

Uniform Commercial Code



- UCC, what is it?
- Where does it come from?
- What does the Uniform Commercial Code have to do with Government Procurement?

Internet address for UCC: [Http://www.law.cornell.edu/ucc/ucc.table.html](http://www.law.cornell.edu/ucc/ucc.table.html)



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- UCC is a collection of Articles covering different aspects of commercial law and has been adopted in all states.

Article 2 of UCC applies to “transactions in goods”, which include sales.

Article 2 only applies to goods (not services) and 2A applies to leases. Sometimes courts apply UCC principles to sales of services as well.

- Since the UCC deals with commercial law and has been enacted by the states, not the federal Government (that is, the UCC does not literally apply to the FAR), a NATURAL QUESTION IS: why does the UCC matter to those involved in Government procurement?
- The UCC sets forth commercial business and contracting practices for the sale of goods and it affects other practices that it does not specifically spell out. Since both FASA and Clinger-Cohen require us (a) to buy commercial items when they are available to meet our needs, and (b) to use commercial practices where appropriate, the UCC is an IMPORTANT RESOURCE and provides a VALUABLE LOOK AT COMMON BUSINESS AND CONTRACTING PRACTICES BETWEEN BUYERS AND SELLERS IN THE PRIVATE INDUSTRY AND IN THE COMMERCIAL MARKETPLACE.
- Many of the concepts now articulated in Part 12 of the FAR are based on those expressed in the UCC.

Customary Commercial Practices

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- Focus on commercial practices involved in the SALE of products (supplies & services)
- Industry treats buying and selling as two distinct functions with different practices, terms, conditions and objectives



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The Government procurement establishment is generally concerned with purchasing supplies and services, and the necessary supporting resources and infrastructures.

Industry, on the other hand, must deal with both the buying and selling of goods and services, which are two very different functions.

In this material, we will focus on those customary practices employed by industry where they are selling, not buying. Government's interaction with industry occurs at this point and under these circumstances: industry is selling and the Government is buying.

Part 10 itself states in 10.002(b)(1)(iii) that the Government should obtain information on customary practicesunder which commercial sales of the products are made. FAR Part 12 attempts to strike a balance between both buyer and seller terms and conditions.

Customary Commercial Practices

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- What are the most relevant practices?
- Which ones affect my procurement the most?



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The amount of Market Research, i.e. review and background work, undertaken for a given procurement depends on many factors such as: amount of time available, urgency and complexity of procurement.

As we stated earlier, the UCC provides insight to the many practices employed in the total marketplace. However, you may increase your degree of familiarity with those practices by reviewing sample sale contracts containing the actual terms and conditions for the specific types of products or services you will purchase.

By looking at provisions such as: warranty, limitation of liability, termination for convenience, changes, excusable delays, etc., you can gain a solid understanding of the common business practices involved, and tailor the solicitation and contract terms accordingly, as well as be prepared for proposed alternative terms and conditions.

What Makes up a Part 12 Solicitation?

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- 52.212-1 Instructions *
- 52.212-2 Evaluation*
- 52.212-3 Reps & Certs
- 52.212-4 T&Cs *
- 52.212-5 T&Cs
- SOW, SPECS, etc *
- Addenda *

* = Can be tailored



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As you will recall, Part 12 will be used for acquisition of supplies or services which meet the definition of commercial items, and services, in FAR 2.1.

This chart and the next one are designed to illustrate how much flexibility we have in creating a “custom” solicitation and contract when acquiring commercial items.

The items referenced above, “transmitted” by the SF 1449 (unless combined CBD/Synopsis used), constitute “NORMAL” RFP for Commercial Items under Part 12. Of these items, only 212-3, 212-5, and the statutory requirements in 212-4 are NON-tailorable. This classification of statutory requirements includes assignments, disputes, payments, invoices, other compliance, and compliance with laws unique to Government contracts. The rest can be adapted to the customary market practices, as they apply to the market conditions of the particular acquisition, and needs of your customer.

The addenda are those documents which will contain your tailored language, if any, to both the solicitation and contract.

What Makes up a Part 12 Contract?

Acquisition
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WEEK III

- 52.212-4 T&Cs *
- 52-121-5 T&Cs
- Contractor Proposal
- SOW, SPECS *
- Addenda *



52.212-1, 52.212-2, 52.212-3 in Solicitation



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Many of the “performance” terms and conditions are found in Clause 52.212-4. Much of this clause CAN be tailored to meet market conditions of each acquisition (12.302(a)). Contracting Officers, therefore, have significant flexibility to adapt the solicitation and contract to fit the situation and environment in which the acquisition is conducted.

Contracting Officers should have a general awareness or understanding of what to expect from a particular market segment based on: market research, review of potential seller’s contract terms and conditions, familiarity with products and services, past experience, acquisition training, similar activity procurements, etc.

To survey the marketplace and access a library of available terms and condition log on to i-mart at <http://www:IMART.ORG>.

Tailoring of Clauses/Provisions

Acquisition
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WEEK III

- . Cannot tailor 52.212-4, statutory provisions
 - . May tailor 52.212-1 and -4 to adapt to
 - . Market conditions
- . May not tailor inconsistent with customary
 - . Practices - waivable by agency if practice
 - . Inconsistent with needs of the government
- . Tailoring accomplished by addenda

12.302



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Commercial Business Practices

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Provisions and clauses established in Part 12 are intended to address, to maximum extent practicable, customary commercial market practices.

However, you may face a broad range of variations in customary practices; therefore, the Contracting Officer may, after conducting appropriate market research, tailor 52.212-1 and much of 212-4 to adapt to market conditions.

Let's look at 212-4. The statutory provisions of 52.212-4 cannot be tailored. The citations in the various paragraphs give you a hint as to what cannot be tailored.

One may not tailor provisions so that they're inconsistent with customary practices, unless a waiver is approved in accordance with agency procedures. When tailoring is appropriate, it is accomplished via an addendum to the solicitation or contract.

12.302

Areas of Emphasis

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- 52.212-4, Contract T&Cs - Commercial Items
- Subpart 12.4, Unique Requirements Regarding T&Cs for Commercial Items
- Subpart 12.2, Special Requirements for Acquisition of Commercial Items
- 52.212-1, Instructions to Offerors - Commercial Items



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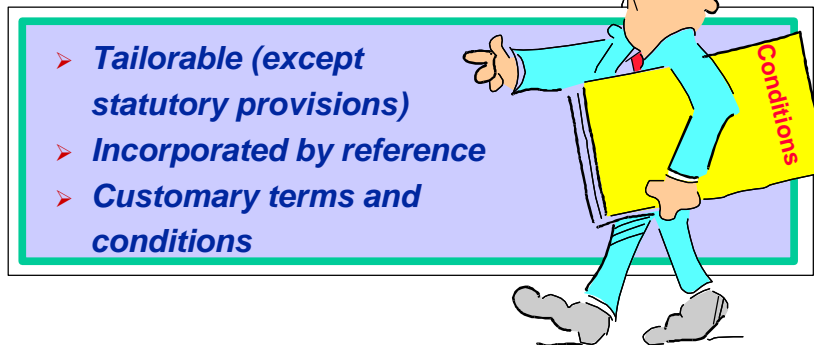
In this topic on Commercial Business Practices, we will cover the above mentioned areas. These areas are perhaps those most affected by Commercial Business Practices.

We will take an in-depth look at 52.212-4 and the paragraphs that permit tailoring. We can tailor more than two-thirds of this clause.

The provision at 52.212-1 may also be tailored, after appropriate market research, to adapt to the market conditions of each acquisition.

52.212-4, Contract Terms and Conditions - Commercial Items

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Commercial Business Practices

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This clause at 52.212-4 contains terms and conditions that attempt to be consistent with customary commercial practices, and to address the “core” areas covered by many commercial contracts. Think of it as a Template. In it you will find unique language addressing such areas as:

- Acceptance, Changes, Excusable delay, Payment T&Cs, Termination for convenience, Warranty, Compliance with laws, Claims.

This clause can be incorporated by reference. It allows the Contracting Officer to tailor certain elements to the particular item being purchased and market conditions for that acquisition (13.302(a)).

Parts you cannot tailor are those driven by statute: assignments, disputes, payment, invoice, other compliance, compliance with laws unique to Government contracts. Tailoring will be done through the use of addenda to the solicitation and contract.

12.301, 52.212-4

Quality Assurance

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Commercial Item Contracts:

- **Rely on Contractor's existing system unless customary practices permit in-process inspection.**



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Commercial Business Practices

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Our first stop deals with Quality Assurance and Inspection & Acceptance. Part 12.2, and its discussion of Quality Assurance, ties into 212-4 and its paragraph on Inspection and Acceptance.

Contracts for commercial items shall rely on contractor's existing quality systems as substitute for Government inspection & testing, unless customary market practices permit in-process inspection.

The emphasis is on fewer "front-end" requirements (e.g., Government approved/acceptable inspection systems and record keeping requirements) and more on "back-end" rights, e.g., warranties and other pre and post acceptance rights.

Any in-process inspection shall be conducted consistent with commercial practice. Generally, companies will not permit their commercial customers to conduct in-process inspections.

This is a cost saver. Government inspection, testing, and acceptance is resource-intensive, expensive, and can be time-consuming.

The next two slides will compare Parts 46 and 12 regarding inspection and acceptance and highlight commercial rights from the UCC. 12.208, 12.402, 52.212-4(a)

INSPECTION/ACCEPTANCE

52.212-4(a) vs 52.246-2

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- Tender conforming items
- Govt right to inspect
- Reject, repair, replace, reperform

- Tender inspected & conforming items
- Govt right to inspect
- Reject, correct; reperform or reduce \$
- Provide/maintain Govt acceptable system. Keep records
- More front-end reqmts



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Commercial Business Practices

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Both the traditional FAR Inspection Clause and new FAR Part 12 Commercial Item clause require Contractor to tender conforming items. Both also allow Government to inspect and test. Also, the UCC allows buyer to test and inspect goods.

In the case of non-conforming items, Part 12 and 246-2 remedies are very similar. 246-2 uses wording “require correction” which equates to repair. 246-2 also implies right to require replacement. 246-2 and similar clauses are more detailed and include right to reduce contract price if defects cannot be corrected by re-performance. This applies to both supplies and services.

246-2 expressly reserves the right to terminate for default, while Part 12’s Termination for Cause paragraph would permit terminating in the event of default or failure to comply with Inspection/Acceptance paragraph.

Perhaps most dramatic differences between the two clauses concern administrative burdens placed upon contractors. Part 12 relies on contractor’s existing quality systems (12.208) and contractor assurances of conformance (12.408), while 246-2 not only requires that the contractor provide and maintain inspection system acceptable to Government, but that it shall also prepare and maintain all records evidencing contractor inspections. These burdens, which are not normal commercial practices, add costs and may even require duplicative inspection systems and procedures be created and maintained by commercial item companies. 52.212-4(a), 12.402

INSPECTION/ACCEPTANCE

212-4 - Other Differences 246-2

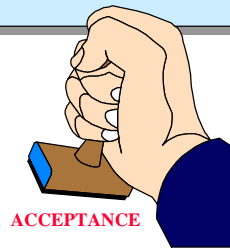
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More post-acceptance rights: Can

- > Revoke acceptance
 - : Discovered defect
 - : Substantial change
 - : Damages/cover
- > Accept item & recover damages
- More back-end rights

Fewer post-acceptance rights. Acceptance conclusive except for:

- > Latent defects
- > Fraud
- > Gross mistakes



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- Under both, inspection does not prejudice rights/relieve other seller failures.
- 212-4(a) says: Government must exercise post-acceptance rights within reasonable time after the defect is discovered, or should have been discovered, and before the item substantially changes. This is similar to UCC (2-608) where buyer may revoke acceptance. UCC ability to revoke depends on substantial non-conformity and other factors, such as assumption that seller will correct, non-discovery of defect due to difficulty in discovering it, or seller's assurances (of conformance). Remember, 12.208 says CI contracts shall rely on seller's assurance of conformance. In addition, UCC 2-714 says that if you don't revoke acceptance, you can still recover damages; and damages can be what is reasonable in the situation.
- 212-4(a) does not specifically limit Government rights either before or after acceptance. Revocation of acceptance is usually action of last resort, normally following attempts at having seller repair or replace defective items or re-perform services. 212-4 has more "back-end rights, that is, after acceptance, especially when coupled with warranties.
- 246-2 limits post-acceptance rights. Only where there are latent defects (not discoverable by reasonable inspection), fraud or gross mistakes amounting to fraud, may Government exercise post-acceptance remedies. 52.212-4(a), 12.402

Changes, Invoice & Payment

Acquisition
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WEEK II

- 52.212-4(c), Changes in T&Cs may only be made by written agreement of parties.
- Read proposals and offered contracts carefully for seller's right to make changes
- Cannot tailor 52.212-4(g) - Invoice and (i) Payment.. But could add information in addendum



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Changes: Unless a party expressly reserves the right to make changes after contract award, neither party may make unilateral changes to a contract. 52.212-4(c)

The “old”, non-commercial item FAR clause reserved to Government the right to make certain unilateral changes within scope of supplies and services contracts.


While every buyer would like to retain this right, commercial buyers usually must pay a premium for it; and the conditions under which it may be utilized are often narrowly drawn.

Some sellers like to reserve the right to make changes, such as substitute newer products, especially on long term contracts. Review proposed terms and conditions carefully for this right. It may be appropriate given the situation or applicable restrictions on the seller.

Invoice & Payment: While the Invoice and Payment paragraphs cannot be tailored because they are required by law, it is possible that a Contracting Officer may want to add supplementary, but NOT inconsistent, information in an addendum, such as specific instructions on submission procedures or locations. 52.212-4(g) &(i)

Excusable Delay

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- 
- **52.212-4(f), Excusable Delays.**
 - **Stand-alone, “commercial-like”**
 - **Beyond reasonable control & without fault or negligence of contractor.**



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This paragraph for non-commercial items previously existed as either part of Part 49 Termination for Default in fixed price contracts, or as a stand-alone clause in cost contracts. Most all commercial contracts have a similar clause.

Some contracts add additional excusable delays such as failure of communications or energy sources or facilities. Adding language to this paragraph, via addendum, would be a common example of tailoring.


Note: the paragraph is not a complete listing, it only provides examples. Additional events could also be excusable. The key is that the event must be (a) beyond reasonable control and (b) without fault or negligence.

Contractor must notify Contracting Officer upon both initiation of excusable delay and its cessation.


The UCC does not provide a “laundry list” of events that would constitute an excusable delay, rather it sets forth a “test” for making that determination. The test determines whether performance has become commercially impracticable because of unforeseen circumstances not within the contemplation of the parties at the time of contracting (2-615).

Termination for Convenience


52.212-4(l) vs 52.249-2



- Have right to terminate
- Pay a % of contract price reflecting % of work performed prior to notice
- Plus get reasonable charges demonstrated from std accounting system



- Have right to terminate
- Painstaking details for claims
- Must use Govt cost principles and procedures
- 249-2 is 12 times longer


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Under both clauses, Government retains unilateral right to terminate the contract totally or in part for its convenience.


Two of the biggest differences between the two clauses are (i) relative simplicity of the Part 12 clause regarding detailed claim procedures, and (ii) Part 12 clause does not require contractor to support all its claimed costs with Government accounting systems. Contractor can use its own standard record keeping system. This removes huge burden and potential risk from contractor. Contractor can also be paid for those reasonable charges it can demonstrate have resulted from termination. There is no right to audit contractor's records solely because of termination for convenience.

In industry, where the practice exists for a party to be able to terminate for convenience, it generally cannot be used to avoid a contract obligation, and is usually found in longer term agreements. A seller may want to increase its prices if a buyer wants an unfettered right to terminate for convenience and possibly reduce the amount of items that may be sold under the contract.

52.212-4(l), 12.403

Termination for Cause 52.212-4(m) vs 52.249-8

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- 
- Any default*
 - Fails to comply with any T&Cs*
 - Fails to provide adequate assurances of future performance*

* - cure notice required except for late performance

- Fails to timely deliver or perform
- Fails to perform any other provisions*
- Fails to make progress so as to endanger performance*

* - cure notice required



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Both Part 12 and Part 49 clauses provide substantial rights to Government to terminate contracts, in whole or part, for cause. Rights established in the clauses are similar. Since 249-8 is eight paragraphs long and 212-4 has three sentences, hence 249-8 naturally contains more details. Terminating a contract for cause when breach is due to late delivery or non-delivery does not require Government to first issue cure notice. In other situations, cure notice should first be issued.

Government also has right, under Part 12, to terminate if contractor fails to provide adequate assurances of performance. This right is also recognized under UCC. For example, this could arise when Contracting Officer has reasonable grounds to believe Contractor will not be able to perform as required and makes an inquiry, or issues cure notice, to contractor. Contractor should, upon request, provide adequate assurance of its ability to perform. UCC (2-609) says the grounds for insecurity and adequacy of any assurance offered should be determined according to commercial standards - which means customary practices in that market.

Many commercial contracts require that the breaching party be given notice and opportunity to cure breach before the other may terminate for cause.

52.212-4(m), 12.403

Termination for Cause - Cont.

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52.212-4(m) Rights & Remedies:

- Uses general wording, preserves all remedies available to any buyer
- Preferred: repurchase (cover) and charge excess procurement costs, plus damages
- Theory: make aggrieved party “whole”, put in same position as if other had performed



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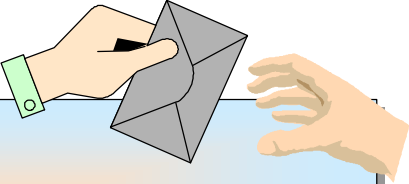
Now that we've described when, under Part 12, the Government can terminate for cause, we'll explore what rights the Government may have upon a termination. First thing to keep in mind is that the clause is very general and does not limit to specific plan. The Government buyer has the same rights as does any other buyer, including commercial buyers.

UCC (2-711) states general rights for the buyer where seller (1) fails to make delivery or repudiates the contract, or (2) the buyer rightfully rejects the goods, or justifiably revokes an already made acceptance. Assuming the breach goes to the whole contract (not a minor breach), the buyer may cancel the contract, that is terminate for cause. In addition to recovering monies already paid, the contractor may repurchase from another company, or cover, plus get damages. This is the Government's preferred action. The idea is not for the Government to become “rich” or punish the contractor, but to be made “whole”.

It is a common commercial practice to limit the types of remedies that a buyer may invoke under the contract, e.g. limit to repair, replace, or refund. These limitations may appear in a variety of clauses such as limitation of liability, termination, or warranty clause, or, sometimes, even as a standalone clause. This may be reasonable depending on the circumstances, if adequate to protect the Government's interests.
52.212-4(m), 12.403


Warranty

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Implied Warranties (12.404):

- **Merchantability**
- **Fitness for a particular purpose**
- **If exclude implied warranties, make sure express warranty is acceptable**

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These warranties are implied to be part of contracts for the acquisition of commercial items, unless the contractor and Contracting Officer agree that they are not part of the transaction.

Both of these warranties are extensively covered in the UCC.

Merchantability means that the item is reasonably fit for the ordinary purposes for which it is used. This does not require an item to be perfect.

Fitness for particular purpose means that the item is fit for the particular purpose for which it is used (meaning that the particular purpose is not a common, ordinary purpose). This applies whenever the seller knows the particular purpose for the item, and the Government relies upon the seller's skill and judgment to determine that the item would be appropriate for that particular use.

In many commercial situations these warranties are excluded by a seller in the terms of their express warranties. This may be appropriate if the express warranties provide for repair or replacement of defective items discovered within a reasonable time after acceptance.

12.404

Warranty

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Express Warranties (12.404):

- FASA requires Contracting Officers to take advantage of commercial warranties
- Solicitations should require offers of same warranties as provided to general public
- Make sure warranty:
 - > protects needs, effective & cost-effective



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Contracting Officers should, to the maximum practicable extent, require offerors to propose at least the same warranties and levels of protection as they offer to the general public. In agreeing to any express warranty, make sure that it is adequate to protect the needs of the Government, e.g. covers the items intended, allows for effective post-award administration, e.g. can be implemented in applicable logistics systems, and is cost-effective.

It is critical to understand what the customer's actual needs are. Warranties are very complex, and it would be easy to "under-buy" (not acquire enough warranty protection) as well as "over-buy" (buy too much and spend too much).

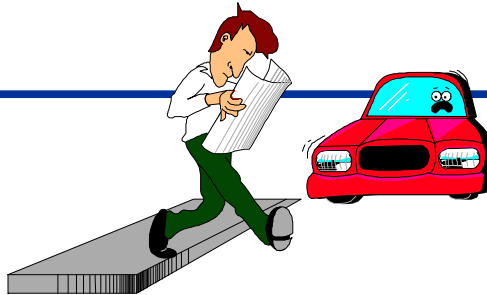
Market research should focus on what types of express warranties are available, especially those that are above and beyond "standard" warranties, and the effect enhanced warranties have on item cost. The lack of standardized terms in the marketplace for different warranty levels underscores the need for specific definitions, and for a clear understanding of the warranty levels actually procured. Every commercial market tends to have its own customs regarding warranties offered, and sometimes warranties are a key differentiator in the marketplace, especially as the items increase in complexity. This is another area with substantial coverage in the UCC - both as to creation and exclusion of express warranties. 12.404

Limitation of Liability

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52.212-4(p), Limitation of Liability:

- Contractor not liable for consequential damages resulting from defects or deficiencies in accepted items,
- Except as provided in express or implied warranty



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Commercial Business Practices

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Many companies, as part of their general approach in selling goods and services, will expressly exclude liability for consequential damages. The exclusion of these damages must be made in a manner that is clear and obvious. The UCC (2-719) recognizes the rights of parties to “shape” their remedies, and allows for the exclusion or limitation of their consequential (and other) damages, unless the exclusion or limitation is unconscionable, as for example: limitation of consequential damages for injury to a person in case of consumer goods.

Consequential damages are those losses or injuries that do not flow directly, and immediately, from the act of the party, but only from some of the consequences or results of the act, e.g. lost profits. They also include injury to person or property resulting from warranty breach.

When questioned by Contracting Officers about the exclusion of consequential damages, a common reply from sellers is that the prices for the item do not include the risk of consequential damages. This may be both accurate and reasonable depending on the circumstances. This exclusion is especially common in the computer industry.

Before agreeing to limits (or exclusions) on consequential damages in warranties, the Contracting Officer should ensure that the remedies being provided adequately protect the interests of the Government, and are appropriate to the circumstances. If so required by your activity, also check with your counsel. 52.212-4(p)

Use of Past Performance

Acquisition
Reform
WEEK III

Consider past performance data from wide variety of sources



Important element of every evaluation and contract award for commercial items

12.206



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Commercial Business Practices

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Using past performance data as an evaluation factor in the purchase of commercial items strongly parallels industry use of past performance. In some commercial contracts, past performance may be the single most important factor in the award decision, especially where the products or services being acquired are complex or essential. It also allows the Government the benefits of a best value type of procurement, as well as increased flexibility and customer satisfaction.

Past performance is a required element for evaluation/award for commercial items. Past performance data is used in Government acquisition in two areas:

- 1) in establishing whether the contractor is responsible (FAR Part 9)
- 2) as part of the evaluation phase

Language at FAR 15.305 and 42.1502 establishes the threshold for inclusion of past performance as an evaluation factor, and the collection of past performance data. DoD has special policy for DoD contracts.

Past performance data is available from sources both inside and outside the Government.

12.206

Pricing of Commercial Items

Acquisition
Reform
WEEK III

- ◆ Acquisition for commercial items are excepted from the requirement to obtain cost or pricing data
- ◆ Policies and procedures for establishing price reasonableness - FAR Subpart 15.4
- ◆ Pricing modifications, excepted also



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Commercial Business Practices

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As a commercial practice, companies are extremely reluctant to divulge too many specifics regarding the composition of their prices. Many commercial evaluations and negotiations are centered on whether the bottom line price is competitive or not, rather than accounting policies and practices used to generate the prices. The commercial item exception for Government acquisition moves in this direction.

Acquisitions for commercial items are excepted from requirement to obtain cost or pricing data. This exception for commercial items is no longer “subordinate” or less important than the other exceptions.

FAR Subpart 15.4 contains policies and procedures for establishing price reasonableness for commercial items.

No cost or pricing data may be obtained for a commercial item modification, unless modification would change the item from a commercial item to a non-commercial item.

Ideally, when buying a commercial item, no additional pricing data should be required to determine price reasonableness. However, the Contracting Officer is still required to make a determination that the price of the commercial item is fair and reasonable. If there is a need for additional information, there are some constraints/guidelines in Part 15 such as: use contractor format, get information normally maintained, limit sales data to data for same/similar items.

12.209

Contract Financing Methods

Acquisition
Reform
WEEK III

Contract Financing Methods

- ◆ Consistent with Market practices
- ◆ Advance (pre-performance) payment
- ◆ Interim (pre-delivery) payments

12.210, 32.2



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Commercial Business Practices

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Contract financing can be a common commercial practice, especially in situations where a seller must “gear up” to produce a large quantity of items, greater than its normal output levels. Other situations could include where it is necessary to hire additional staff or to disperse an existing staff to new locations. Generally, the smaller the supplier, or the greater the inventory costs, the more common contract financing would be.

Post-FASA FAR recognizes buyer financing as a customary market practice for some commercial items. In these cases new Subpart 32.2 (Commercial Item Purchase Financing) would be used in lieu of other Part 32 areas, including those for customary progress payments. In industry this is sometimes called customer financing or buyer financing.

Generally, the two types of Contract Financing FAR allows are:
Interim (pre-delivery) payments which apply after some work has been done, but prior to delivery. Example: purchase of inventory.

Advance (pre-performance) payments which may not total more than 15% of contract price. This is paid after award, but before any work starts.

If market research confirms buyer financing is customary, Contracting Officer may offer it.

Buyer financing gives Contracting Officer greater flexibility.
12.210, Subpart 32.2

Technical Data

Acquisition
Reform
WEEK III



- ♦ *Only that customarily provided to public*
- ♦ *If required, use appropriate provisions and clauses*

12.211



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Commercial Business Practices

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Technical data, and anything else in the realm of intellectual property, including software, trade secrets, process data, etc., may be very valuable to a company. Depending upon the particular market sector and the specific company, these rights may be a company's most valuable assets. Companies earnestly try to limit rights to technical data to preserve its value. Trying to gain more than customary rights may drive up prices or reduce competition.

Except as provided by agency-specific statutes, Government shall acquire only technical data (and rights in it) customarily provided to the public.

When acquiring technical data, assume that the data delivered was developed exclusively at private expense.

If technical data is required, include appropriate provisions and clauses in an addendum to solicitation and contract.

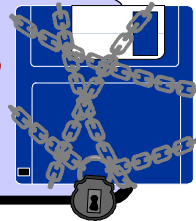
Just as with computer software rights, don't "overbuy"; that is, don't buy (or attempt to buy) more rights than the customer actually needs.

12.211

Computer Software

Acquisition
Reform
WEEK III

- ♦ **Contractors not required to**
 - ♦ **furnish information not customarily provided to the public**
 - ♦ **relinquish rights (e.g. reproduction) unless mutually agreed to**



- ♦ **Acquired under licenses customarily provided to general public**

12.212



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Commercial Business Practices

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In order to preserve the value of computer software, companies must handle its licensing terms very carefully. This applies to both the number of copies, as well as to those portions of the programs that can be copied.

Again, like technical data, don't overbuy on commercial software. And don't even think about trying to acquire rights to source code for commercial software; that will surely drive away competition.

Both commercial computer software and its related documentation shall be acquired under licenses customarily provided to the public.

CAVEAT: Some parts of commercial software agreements may not be acceptable to Government; so read them completely before agreeing to use them. An example of this would be a requirement for the Government to indemnify the contractor for misuse of the software.

Offerors not required to:

Relinquish to Government rights to use, modify, reproduce, release, perform, display or disclose commercial software or documentation except as mutually agreed to.

Furnish tech information related to commercial computer software or computer software documentation not customarily provided to public. 12.212

Other Customary Practices

- ♦ If other customary practices are appropriate, consider including
- ♦ Provides flexibility



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Commercial Business Practices

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It is customary for both the buyer and the seller to propose terms and conditions for a given transaction, written from their individual perspectives. In order to have a contract, the parties must eventually come to terms on the most critical elements of their positions. The fact that the FAR recognizes that other practices may be appropriate and used in a given procurement, increases the likelihood for concluding mutually acceptable contracts with world-class suppliers.

Terms and conditions in Part 12 are written from the Government's perspective as a buyer in the commercial marketplace. These are generally appropriate for many buys. However, FAR recognizes that one size does not necessarily fit all situations.

The general guidance is that, if other practices are appropriate to a particular buy, they should be considered for use when they help in concluding a mutually agreeable business arrangement, and are not otherwise precluded by law.

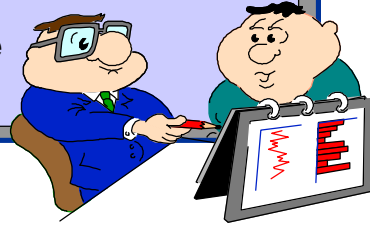
This provides the Government with the appropriate flexibility necessary to mirror the marketplace. It also stresses the need to be familiar with common seller terms and conditions for the particular goods and services that you procure.

12.213

Instructions to Offerors

Acquisition
Reform
WEEK III

- **52.212-1, provides single streamlined set of instructions to offerors**
- **Incorporated by reference**
- **Can be tailored**



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Commercial Business Practices

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This provision provides a single streamlined set of instructions to offerors, which is unique to Government contracting for commercial items. This is incorporated into the solicitation by reference, and it can be tailored to the circumstances of the buy. This ability to tailor gives you flexibility to address the marketplace practices as well as to meet the needs of your customer. For example, the past performance paragraph is only one sentence in length. It could be tailored to those situations where past performance will play a greater role in the award. Additional information pertinent to past performance would be provided via an addendum to the situation.

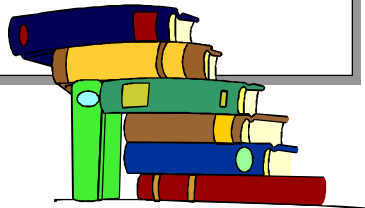
The fact that this provision can be tailored mirrors commercial practices where acquisitions can be, if necessary, tailored to the particular situation.

52.212-1, 12.301

Summary

Acquisition
Reform
WEEK III

- **Push to buy commercial items**
- **Required by law, regulation & common sense**
- **Must develop/enhance skills in commercial business & contracting practices**



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Commercial Business Practices

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It is clear that there is a great impetus to buy commercial items and to use commercial business practices to do so.

To succeed in Commercial Item acquisitions, Government contracting personnel, as well as all those others involved in the procurement process, must either develop new skill sets or enhance existing ones in order to seize the maximum available benefits from acquisition reform. It is critical that Government personnel become familiar with the commercial business and contracting practices surrounding those items they procure as well as the respective terms and conditions normally utilized in their sale. This will ensure competition to the maximum practical extent as well as making sure the prices received are more similar to those frequently seen in the commercial marketplace.

D i s c u s s i o n / E x e r c i s e T a s k s

Com m e r c i a l B u s i n e s s
P r a c t i c e s

c q u i s i t i o n

A R e f o r m
w e e k

- COMMERCIAL BUSINESS PRACTICES EXERCISES -

INSTRUCTIONS FOR THE EXERCISE:

Ideally, you should break up into groups small enough so that free discussion will be promoted. The goal of this exercise, and the situations/questions, is not to come up with the “right” answer, but rather to stimulate thoughts and discussions. The purpose is to think about, and to discuss situations and issues facing contracting personnel at all levels when acquiring commercial items; to reinforce the idea that contracting personnel possess the ability to tailor solicitations and contracts to the market conditions in which their procurements are conducted; to emphasize that drafting or using alternative terms and conditions may be appropriate. Basically, for each Situation, the group should decide what issues are involved and how they should be addressed. Specific tasks for the situations are provided at the end of each one.

SITUATION NUMBER 1 - Customary Practices and the Solicitation

Its Monday afternoon and you have a Wednesday morning meeting with the Program Manager (“PM”) of a commercial item acquisition which you will be handling as the Contracting Officer - the very first buy in which you can use your “new” warrant. You know he will want to talk about the results of the Market Research (“MR”) you have on your desk, and if and how that MR may affect the procurement, plus any other issues you see at this time. The acquisition will be for state of the art copiers (reprographics equipment), including operators manuals and various user documentation, as well as equipment support and maintenance. You are excited about the opportunity to run an acquisition for a high technology product. You have the documentation that clearly indicates that these items will need to be procured by your RFP since they are not available through GSA or any other Government schedule or contract arrangement. You want to carefully review through all the material you have and plan a general approach to the solicitation/acquisition. You are anxious to be able to utilize customary commercial practices revealed in the MR for this acquisition and to do the necessary tailoring. You know that there will be several issues that will need to be discussed with the PM and you believe those issues will help “shape” the RFP. Most of all, you want to make sure that the PM realizes that you are on top of the situation and can trust you to be thorough.

Results of your Market Research

Warranties. Within the MR you have, you first want to concentrate on commercial practices pertaining to warranties. From reading through the materials, you realize that warranties are a lot more complex than you had previously imagined. You notice that each company seems to have its own unique warranty plans as well as unique terms and phrases to describe the warranty coverage. You are having a hard time deciding what you want to be your “basic” warranty requirements and how to describe them. You see that some companies call their standard warranty coverage - “basic”, while

others call it “standard”, and still others call it their “customer support plan”, and finally some use the word “enhanced”. When you look at the hours and types of coverage, you become even more confused and can feel your blood pressure begin to rise. You know that you should use commercial practices where they are appropriate; but believe if you have to make this many decisions in buying commercial items, it looks like it might be more of a challenge than you had anticipated. When you look at the hours of warranty coverage and types of support offered in the commercial marketplace, they are “all over the board”. It seems that everybody offers some sort of business hours/business day coverage, but after that, things get murky. Some offer eight-hour coverage, while others offer twelve-hour and sixteen hour and still others offer twenty-four hour coverage. Then you look at what days for which coverage is offered. Some just offer coverage for five days a week and others offer coverage for six or seven days per week. Things do not become any clearer when you look at the way in which support is provided: some by toll free phone numbers, some by actual visits (on-site), and some by a mixture of visits and phone support depending on when the breakdown occurs (during regular hours or during evenings or weekends). How can you advise the PM on such an important area of commercial practices as warranties in the upcoming procurement when you have this many choices and information? You remember him saying something about really wanting warranty coverage for the period of 8:00 am to 5:00 PM Monday through Friday, but that he wanted to be able to take advantage of other plans that might be available. You have a feeling that the issue of warranties may affect other aspects of the procurement, such as how the solicitation document itself may be written. You recall that FAR Part 12 had a section on warranties and strongly encourages Contracting Officers to take advantage of express commercial warranties.

QUESTION: As the Contracting Officer, how are you going to approach the meeting with the PM and the questions of warranty types and coverage, as well as other issues that may arise because of these warranties? You don’t need to know all the “answers” at this point, but you do need to have some sort of “plan” for your discussions with the PM, and you also need to be able to provide sound advice and guidance. Since you know he’ll ask, what will you advise the PM, especially in regard to tailoring the solicitation document for warranty requirements? Are there other issues that may bear on the procurement as an outgrowth of the Market Research on commercial practices for warranties?

SITUATION NUMBER 2 - Alternative Terms and Conditions and the Proposals

Its now been over two months since your meeting with the PM. You were able to craft, what you believed to be, a very sound RFP appropriately tailored to address warranties and last night the proposals rolled in. Since the closing date for receipt has now passed, and you received a total of three proposals, you decide that you may as well get started reviewing them. You wonder whether you will see any of those alternative terms and conditions that you heard are often proposed by industry in response to commercial item solicitations.

Proposal A:

In didn't take long to find the first alternative terms and conditions! There it is on page two of the proposal: "The Contractor reserves the right to make product substitutions of equipment or related items including components and sub-components ("Substituted Product"), if, in the reasonable opinion of the Contractor, the Substituted Product offers better or equal capabilities or functions including, but not limited to: enhanced reprographics capability, additional throughput capacity, increased ability to integrate and operate new functions or features, at the same or lower price than the existing product". Your first thought (after you ask yourself, where in the world do they get the people who write such convoluted sentences?) is: that Contractor has some nerve to reserve the right to make changes to a Government contract; after all, only the Government can do that. Then, you think for a moment and remember that with Commercial Item acquisitions, not even the Government can make unilateral contract changes anymore. You also recall a conversation that you had two days ago with the Program Manager in which he said that high technology companies must be able to substitute new equipment and technology for the older technology because the industry moves so fast (as you know modern copiers use computer processing technology to operate). Besides that, the Program Manager did say that he wanted this contract to allow him to get the latest and greatest state of the art technology - not just after award - but during its whole life. After having digested that, maybe there is a way to establish some sort of clause that allows technology upgrades, and maybe the proposal shouldn't just be rejected as non-responsive.

Discuss: Does it make sense to further explore a clause that could allow the Contractor to offer new products? Is the Changes clause one of those that could potentially be tailored? Should you seriously consider tailoring, or should you just go ahead and reject the proposal? If you think you should further explore the idea of tailoring, what sort of limitations should the clause have? After all, we don't want the prices to skyrocket after award. Would tailoring the Changes clause, or having some sort of provision allowing upgrades, make it easier or harder for the customer to receive the most benefits from their contract? Would it make post-award administration easier or more difficult?

Proposal B:

Well at least this contractor didn't want to reserve the right to make changes to the contract after award, but it does want to change the "Excusable Delays" clause to add "failure of utility services, including power and communications facilities". You recall that this is a clause that was said to be "very commercial-like"; but does it make sense to change it and add the contractor's suggested wording?

Discuss: Is it appropriate for a contract for high technology equipment and support to have the above suggested change to the Excusable Delays clause? What are reasons for making the requested change and what are reasons against making the change? Do you think having these additional items in an Excusable Delays clause would be a customary commercial practice? Why or why not?

Proposal C:

(The last one!). This is what this contractor wants to add to the Termination for Cause clause: "Prior to terminating the Contract for cause under 52.212-4(m), the Government Contracting Officer shall provide the Contractor with reasonable written notice of any alleged defects in Contractor's performance or items delivered under the Contract. Government is not required to provide any such notice prior to terminating in the event that the Contractor is late in any performance or deliveries."

Discuss: Can this clause be tailored? If so, what sort of tailoring would be acceptable and appropriate given the situation? Is what the Contractor wants reasonable? Would agreeing to provide notice in those specific circumstances restrict the Government in an unreasonable manner? Would it make a difference to your willingness to consider tailoring if, in your review of a sample of commercial sales contracts, you often see this type of "notice requirement"?

GENERAL DISCUSSION QUESTION (not specifically tied to any particular situation):

Discuss how the major points covered in both the slides and in the exercises compare to the issues that you face everyday in your own contracting shop.

acquisition

r e f o r m

W e e k

S o l u t i o n s

C o m m e r c i a l

B u s i n e s s

P r a c t i c e s

“ANSWERS” AND “GUIDANCE”

SITUATION NUMBER 1 “Guidance”

This situation is designed to stimulate thoughts and discussions on a number of topics: (1) tailoring solicitations and contracts to fit the market conditions and applicable commercial practices; (2) the specific subject of warranties; (3) potential need for a clear set of definitions in the contract, or at least in any clause dealing with warranties, to alleviate confusion over what terms may mean; (4) need to focus on the market conditions for a specific buy, that is, what are the customary commercial practices and how can you use them to benefit your customer, (5) importance of not losing sight of your customer’s needs.

(i) Regarding (1) and (2) above: In the solicitation phase, specify in the solicitation what the minimum requirements are and let industry tell you what they can offer. FAR Part 12.404 encourages Contracting Officers to take advantage of commercial warranties. If you want to take advantage of increased warranty support, spell that out in RFP, as well as that you invite offers of warranty support for more than just the standard 8:00 am to 5:00 pm window, if that is your real need. Specify that the Government reserves the right to make tradeoffs between price and warranty coverage. Be clear about what will be evaluated and stick to it. Also, keep in mind the “basic tenets” of warranties: should cover the items that need coverage, be cost-effective, and represent a warranty program that can be successfully administered in a post-award environment; for example, what is the process for calling in for help, do you physically return defective items, is there a notice period for registering defect calls after which the contractor will not be liable, etc.

(ii) Regarding (3) above: When you are dealing with “terms of art”, that may carry more than one meaning depending on your perspective or may potentially be confusing, it’s always a good idea to spell out exactly the meaning that will be employed in the contract (and perhaps solicitation as well). It is better not to leave to chance issues such as term meanings. It is a general rule of contract interpretation that a term with more than one meaning will generally be construed against the party that drafted the agreement. For example: if a Contracting Officer uses a phrase that may be susceptible of more than one meaning, in the event of a dispute over the meaning, there is a reasonable chance that the final meaning assigned may not be the one intended by the Government.

(iii) Regarding (4) and (5) above: The fact pattern was designed to “carry the Contracting Officer away” from the true focus of any acquisition, which is, what does the customer really need? Also, it was designed to simulate what may be common in some commercial item acquisitions: one can be overwhelmed with the information (commercial practices) and the choices that the marketplace can bring to any acquisition. When faced with a situation like the above one, read through all the materials so that you are familiar with it and any issues, then meet with the PM and/or

users and act as their advisor. Explain that they may have many choices, but to focus on their basic need first. They may not realize they have as many opportunities and choices as they do, but you also need to keep them from drifting away from their basic needs and goals as well. You need to guide them through the pre-solicitation phase as much as during the actual proposal review and award stages. This is true whether you are dealing with warranties or other issues.

SITUATION NUMBER 2 “Guidance”

Like Situation Number 1, this one is also designed to stimulate thoughts and discussions on a number of topics.

Proposal A:

Guidance: What is expected to be a customary commercial practice in this particular industry? Is the practice appropriate? Is it otherwise prohibited by law? If it is appropriate to conclude a satisfactory business arrangement and is NOT prohibited by law, FAR 12.213, advises that it should be considered. Is there a way to have a provision to permit some contractor substitution but that also allows the Government to maintain control over the contract? The topic of technology upgrades and substitutions is a complex one, but it is presented as the first scenario to urge the class to “think outside the box” right from the beginning in these scenarios.

Proposal B:

This should be a fairly easy decision to make: allowing for the tailoring of the Excusable Delays clause to include failure of utility services. If the students have trouble with this one, the instructor may want to have the students re-read 52.212-4(f) and see if it looks like the list of items is absolutely limited to those in the clause, or if it appears you could add other items. Secondly, ask the students whose fault it should be if the power company “drops the load”, and the contractor’s assembly line is “powered down” as a direct result.

Proposal C:

First of all, most contracting personnel recognize that this clause is a very important one. But just because this is a critical clause, does not mean that it cannot be tailored. Draw the students’ attention to what limits the ability of a Contracting Officer to tailor a clause, which is, where the clause implements a statutory requirement. Look at the clause itself; does it cite a statute? Also, what does the FAR say about being able to exercise a termination for cause? When does it say that a cure notice is required? It says a cure notice is required unless the termination comes about because of late delivery (12.403). A main point in this Proposal C scenario is: we know that we must give notice; is it, therefore, appropriate to so state? Also, another point is to stress that just because a clause is a very important one (like Termination for Cause) does not mean that we cannot tailor it. Only those few clauses that implement statutory requirements are automatically “hands off”.